Office - Supreme Court, U.S.
FILED
SEP 6 1957
JOHN T. FEY, Clerk

No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
EARL E. POLLOCK,
Assistant to the Solicitor General,
Department of Justice, Washington 25, D. C.

EARL W. KINTNER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
ALVIN L. BERMAN,
Attorney,
Federal Trade Commission, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Reasons for granting the writ	13
Conclusion	24
Appendix A	25
Appendix B	37
Appendix C	38
Appendix D	39

CITATIONS

Cases:

Allgeyer v. *Louisiana*, 165 U. S. 578	20
American Hospital and Life Insurance Company v. *Federal Trade Commission*, 243 F. 2d 719	10, 15, 36
Hoke v. *United States*, 227 U. S. 308	19
Hoopeston Canning Co. v. *Cullen*, 318 U. S. 313	20
Lumbermen's Ins. Co. v. *Meyer*, 197 U. S. 407	20
Maryland Casualty Co. v. *Cushing*, 347 U. S. 409	16
Mutual Life Ins. Co. v. *Spratley*, 172 U. S. 602	20
New York Life Insurance Co. v. *Dodge*, 246 U. S. 357	20
North Little Rock Transportation Co. v. *Casualty Reciprocal Exchange*, 181 F. 2d 174, certiorari denied, 340 U. S. 823	18
Osborn v. *Ozlin*, 310 U. S. 53	20
Prudential Insurance Co. v. *Benjamin*, 328 U. S. 408	18, 19
Travelers Health Assn. v. *Virginia*, 339 U. S. 643	20, 21
United States v. *McKesson & Robbins Co.*, 351 U. S. 305	17
United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533	10, 13, 15, 16

437781—57——1

Constitution and statutes: Page
United States Constitution, Fourteenth Amendment 20
Federal Trade Commission Act, Sec. 5, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45 2
McCarran-Ferguson Act, 59 Stat. 33, as amended, 61 Stat. 448, 15 U. S. C. 1011–1015 2, 22
Insurance Code of Michigan, 1956, ch. 20, Secs. 24.12001–24.12050 20

Miscellaneous:
91 Cong. Rec. 1442–1444, 1477–1488 20, 23
91 Cong. Rec. 1443 16
91 Cong. Rec. 1483 22
91 Cong. Rec. 1484 23
H. Rep. No. 143, 79th Cong., 1st Sess. 16, 20, 22
S. Rep. No. 20, 79th Cong., 1st Sess. 22
The Weekly Underwriter, vol. 174, No. 1, p. 82 (January 7, 1956) 14
The Weekly Underwriter, vol. 176, No. 1, p. 82 (January 5, 1957) 14

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above cause on June 6, 1957.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 25–36) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1957 (Appendix B, *infra,* p. 37). The time for filing a petition for writ of certiorari was extended by Mr. Justice Brennan on August 23, 1957, to September 6, 1957 (Appendix C, *infra,* p. 38). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) authorizes the Federal Trade Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. The question presented is whether the McCarran-Ferguson Act (15 U. S. C. 1011–1015) is to be construed as divesting the Commission of jurisdiction over false and misleading advertising in connection with the interstate sale of insurance because of the mere enactment of state laws prohibiting such practices within the boundaries of the states involved.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. 45, provides in part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Act of March 9, 1945, 59 Stat. 33, as amended, 61 Stat. 448, 15 U. S. C. 1011–1015 (herein referred to as the McCarran-Ferguson Act), provides:

> *Be it enacted by the Senate and House of Representatives of the United States of*

America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not

apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

STATEMENT

On March 11, 1955, the Federal Trade Commission issued a complaint against the respondent, the National Casualty Company, charging that the company had in the course of its interstate business of selling accident and health insurance falsely advertised its insurance policies and thereby violated the Federal Trade Commission Act (R. 2–11, 19).[1] In its answer, National admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading and denied that it had violated the Federal Trade Commission Act. The answer affirmatively alleged that under the McCarran-Ferguson Act the Commission was without jurisdiction over the company's interstate insurance business because

[1] We use the designation "R." to refer to the printed appendix of the National Casualty Company in the court below.

of the enactment of state statutes regulating unfair or deceptive acts or practices within the states involved (R. 15a–18a).

The facts. Hearings were held before an examiner, who made detailed findings of fact (R. 269a–283a). The basic facts relating to the conduct of National's business, as found by the examiner, adopted by the Commission, and accepted by the court below, are as follows:

National is a Michigan corporation with its principal place of business in that state (R. 269a). It is engaged in selling health, accident, and all types of casualty insurance and is licensed to sell such insurance in all states, the District of Columbia, and Hawaii. The challenged representations relate only to its accident and health insurance business, from which it received premiums of more than $15,000,000 in 1953 and more than $16,000,000 in 1954 (R. 269a).

National sells its insurance policies through the solicitation of from 350 to 400 direct but independent insurance agents throughout the nation (R. 269a). National prepares and sends interstate to these agents direct mailing cards, stuffers, one-page lead sheets, form letters, applications with tear sheets, and throwaways (R. 269a–270a). Most of the material containing the challenged representations is shipped by mail to the agents in bulk. The agents disseminate the material locally either by mail or personal distribution. Something less than 5% of National's advertising material, however, is also disseminated

by National directly from its offices in Detroit to the public on behalf of its agents (R. 270a).[2]

The examiner's decision. The examiner grouped the challenged representations into five categories: (1) misrepresentations as to the continuation of the policies after purchase;[3] (2) misrepresentations as to the required physical condition of the insured;[4] (3) misrep-

---

[2] 80% or more of National's accident and health policies are issued by it from its home office after receipt, checking, and consideration by it of the prospect's signed application previously secured by the agent. Policies issued are forwarded to the agent for delivery to the insured. A limited number of agents may issue policies directly, but National has the right to reject such policies after consideration of the application and policy which have been forwarded to it by the issuing agent.

[3] Under this category, the examiner found that National represented the following (R. 272a): "No increase in premium because of age. * * * No decrease in benefits because of age. * * * Lifetime accident benefits. * * * For employed men and women ages 16 to 69 years inclusive. * * * Life indemnity accident coverage. * * * For individuals or family groups—ages 1 day to 69 years. Security plan with lifetime benefits. * * * I understand this peace of mind and security will be mine from the first day—even for life. * * * We have removed all age termination limits from the policy."

The examiner found that National's policies "all provide that they may be terminated" by National at its option at the end of any premium period, and that two of its policies provide that they "may be cancelled at any time" by National. The examiner held that the representations are deceptive and misleading in that "these statements can reasonably be expected to give a substantial number of readers the definite impression that the policy will continue in effect so long as premiums are paid at least until age 69, or even for life, with full indemnification" (R. 273a).

[4] With respect to this category, National advertised the following: "No medical examination required." The examiner found that National's policies all provide that no benefits will

resentations as to the extent of coverage;[5] (4) misrepresentations as to the dollar amounts payable for opera-

---

be paid for loss resulting from sickness, the cause of which is traceable to a condition existing prior to or within a certain number of days (usually 15 or 30) after the effective date of the policy, and that National shall have the right and opportunity "to examine the person of the insured when and as often as it may reasonably require" during the pendency of any claim under the policy. National's accident policies require that "the loss shall result directly and independently of all other causes," to show which the insured may have to submit to medical examination. The examiner held that the representation that no medical examination is required carries the definite impression that National "insures without regard to the prospect's physical condition either before or after issuance of the policy," and that since this is not the fact the representation is misleading and deceptive (R. 273a–274a).

[5] Under this category, National advertised as follows (R. 275a): "The most complete and broadest coverage at the lowest rates. * * * Monthly benefits up to $300 per month paid from first day of sickness or accident plus $300 per month for hospitalization. * * * Hospital room and board for 100 days for each sickness or accident. Your choice of plans paying from $5 to $12.50 per day. Pays full benefit even if your hospital room costs less. * * * Guaranteed monthly income for sickness. * * * Guaranteed monthly income for accidents. * * * When I am sick $600 a month as long as three months. * * * New modern all-inclusive hospital surgical nurse protection. * * * Occupational and non-occupational accidents fully covered. * * * Full coverage on or off the job. * * * Full coverage for female diseases. * * * You should be fully protected against these expenses."

The examiner found that National's policies "contain exclusions and limitations which belie 'most complete' or broadest coverage' 'fully protected', 'first day of sickness', etc." (R. 275a–276a). The examiner held that the discrepancies in this respect between the promises of the advertising and the provisions of the policy "may well be reasonably expected to give a prospect an impression of wider and fuller coverage than he gets," and that the advertising representations are "deceptive and misleading" (R. 276a).

tions;[6] (5) misrepresentations as to the time periods for which monthly benefits would be paid.[7] The examiner found that National's policies were deceptively advertised as charged except for category number four.

With respect to the jurisdictional issue, the examiner held that the Commission had jurisdiction to proscribe

---

[6] Under this category, National advertised as follows (R. 277a, 298a): "Surgical Operations, whether performed in or out of the hospital, are paid up to $300 IN ADDITION TO HOSPITAL BENEFITS. FULL benefits are paid to all insured members of the family group. * * * SURGERY BILLS from $5 to $300 for sickness or accident. * * * Pays surgical operation expenses up to $300. * * * Surgical plan—to $300. * * * Three choices of surgical operation benefits $5 to $150, $7.50 to $225, $10 to $300. * * * Your Doctor Bills Paid AT HOME, AT HOSPITAL, AT YOUR DOCTOR'S OFFICE. * * * $10 to $300 Available Surgical Operation Fees. * * * Pays surgical operation fees up to $150. * * * Who Pays These Bills? YOU SHOULD BE FULLY PROTECTED AGAINST ALL THESE EXPENSES. * * * NEVER BEFORE HAS SUCH PROTECTION BEEN OFFERED."

The examiner held (R. 278a) that these representations are not false or misleading. The Commission reversed on this point (R. 298a–300a), stating in part (R. 301a–302a): "Through such statements, respondent has represented, among other things, that the policies to which they refer provide indemnity up to a maximum sum of $300 for any operation serious enough to cost such an amount. Respondent's policies do not so provide."

[7] Under this category, the examiner found (R. 279a) that National's "representations reasonably give the impression of indemnification in a specific amount for a definite period of time. 'From the first day for two years,' 'From the first day as long as totally disabled—even for life,' 'Accident income $— per month,' etc., reasonably convey that impression."

He further found (R. 279a–280a) as follows: "Respondent's policies themselves, however, confer the indemnity promised only if the insured is wholly and continuously disabled by sickness and prevented thereby from performing any and every occupation or employment plus being under the personal at-

deceptive and misleading representations made by National and disseminated directly by mail to prospective purchasers in the several states. He further held that the Commission had jurisdiction to stop National from transmitting such deceptive and misleading representations to its agents for local dissemination in the states of Mississippi, Rhode Island, Missouri, Montana, and the District of Columbia. However, on the basis of the McCarran-Ferguson Act, the examiner concluded that the Commission had no jurisdiction over similar acts and practices of National involving its agents in the other states, each of which had enacted legislation prohibiting the dissemination of false or misleading statements regarding insurance (R. 287a).[8]

---

tendance of a doctor. Obviously, there is much illness and disability which does not meet these requirements, especially during convalescence. Some of respondent's policies require continuous confinement to the house, before respondent will pay. Other exclusions are any indemnity for more than one month where loss is due to tuberculosis, hernia, paralysis, or mental derangement; no sickness which began before thirty days after policy issuance; disability arising more than 5, 20, or 30 days after the accident; maternity benefits only after policy has been in effect 10 months—in other words, respondent gets 10 months' premiums before it has to pay for loss of time for maternity."

[8] The examiner found that some 36 states had enacted the so-called "Model Code" or "Unfair Trade Practice Model Bill", which prohibits the dissemination of false or misleading statements regarding insurance. And he found that, in addition to these 36 states, 8 others had statutes which, "while couched in different language or varying somewhat in detail, are essentially the same in effect as the 'Model Bill.' Of the remaining five [jurisdictions], one—Mississippi—has no 'regulation' of the insurance business at all, and remaining four have only statutes which patently refer only to life insurance companies, which this respondent is not." (R. 284a–285a.)

The Commission decision. The Commission held that all the advertising representations set forth in the complaint were unfair and deceptive as charged. It further held that it had jurisdiction over the unfair and deceptive advertising practices of National in interstate commerce and that the mere enactment of state laws relating to such practices did not operate to divest it of jurisdiction (R. 293a–294a). The Commission accordingly entered an order consonant with these views (R. 301a–305a).

On the question of its jurisdiction, the Commission relied upon its opinion in *American Hospital and Life Insurance Company* (Appendix D, *infra,* pp. 39–92). In that case, on similar facts, the Commission recognized that the McCarran-Ferguson Act was enacted for the purpose of allowing the states to continue to regulate the business of insurance in their usual manner, thus dispelling doubts raised by *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533. But the Commission did not read the Act, especially in the light of circumstances that led to its passage, as a complete abdication of all federal regulation of the interstate aspects of the business of insurance (*infra,* pp. 41–55). Such activities, the Commission held (*infra,* pp. 46–47), could not be "regulated by State law" and hence remained subject to its jurisdiction by virtue of the Section 2 (b) proviso "That after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law." In the Commission's view (*infra,* p. 53), there is "an irreducible

area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation 'to the extent that such business is not regulated by State law' is inoperative."

Implicit in the view of the hearing examiner, the Commission stated (*infra*, pp. 41–42), "is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. * * * We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation admits of such a construction." The Commission further stated (*infra*, pp. 47–49, 54):

> The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent

> to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.
>
> * * * * *
>
> * * * Congress gave the States about three years in which to define a reasonable area of State police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.
>
> * * * * *
>
> By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. * * *

The Commission thus concluded that the mere enactment of a state law relating to advertising practices of insurance companies did not operate to oust it of jurisdiction.

The Court of Appeals decision. On National's petition to review, the court below set aside the Commis

sion's order and remanded the case to the Commission for further proceedings consistent with its opinion. In rejecting the Commission's conclusion on the jurisdictional issue, the court (*infra,* p. 32) recognized "some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation." The court, however, held that the Commission was without jurisdiction in those states which had enacted legislation relating to insurance advertising.

REASONS FOR GRANTING THE WRIT

1. This case presents a substantial question of wide public importance as to the scope of the regulatory authority of the Federal Trade Commission. The question is whether the Commission, as the court below held, has no effective jurisdiction over the advertising practices of the insurance industry—a business viewed by this Court as "one of the largest and most important branches of commerce," one which "touches the home, the family, and the occupation or the business of almost every person in the United States." *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, 540.

More specifically, the case involves advertising practices in connection with sales of accident and health insurance. Such sales quadrupled in the decade following the 1944 *South-Eastern Underwriters* decision and yielded in 1955 a conservatively estimated 2.8 billion dollars in premium volume—a premium vol-

ume second only to life insurance. The number of persons protected today by voluntary health insurance, sold by over 700 companies in the United States, amounts to more than 63% of the entire population of the nation. In addition, approximately 60% of the estimated 60,000,000 working population have some degree of insured protection against loss of income resulting from accident and sickness.[9]

Taking note of widespread evidence that the extraordinary growth of this type of insurance has been accompanied in many instances by false and misleading advertising, the Commission has undertaken an active program under Section 5 of the Federal Trade Commission Act to eliminate such practices from the channels of interstate commerce. In all, the Commission since October 1954 has issued 41 complaints charging insurance companies with engaging in false and misleading advertising practices in connection with the interstate sale of accident and health insurance. The Commission has issued 13 orders to cease and desist under these complaints, and hearing examiners have issued initial decisions containing orders in ten other cases which have not yet been acted upon by the Commission. The cases comprise every possible method of advertising and selling accident and health insurance in interstate commerce, including use of the United States mails (as in the instant case), radio, television, newspapers, and other periodicals.

---

[9] These statistics appear in *The Weekly Underwriter*, Vol. 174, No. 1, p. 82 (January 7, 1956), and *id.*, Vol. 176, No. 1, p. 82 (January 5, 1957).

The decision of the court below, however, denies to the Commission any effective jurisdiction in this field. In reaching that decision, the court below followed the decision of the Fifth Circuit in *American Hospital and Life Insurance Company* v. *Federal Trade Commission,* 243 F. 2d 719, in which the Commission is also seeking certiorari in an accompanying petition. Under these two decisions, Commission jurisdiction is automatically extinguished upon the mere enactment of state laws relating to insurance advertising practices—extinguished without regard to the fact that the transactions may, as a practical matter, be beyond the scope of effective state regulation; without regard to the fact that the transactions may have both interstate and intrastate aspects; and without regard to the fact that the federal action would not conflict with state action.

These holdings, we submit, present a question which should properly be resolved by this Court.

2. As this Court noted in *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 552: "The power granted Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." This inherent incapacity of "the individual states, with their limited territorial jurisdictions," was left unchanged by the McCarran-Ferguson Act, which indisputably did not

add to the jurisdiction possessed by the states prior to the *South-Eastern Underwriters* decision. As pointed out in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413: " * * * even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in [*South-Eastern Underwriters*] might be found to have on State regulation of insurance." Thus, the House report accompanying the legislation flatly stated: "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." H. Rep. No. 143, 79th Cong., 1st Sess., p. 3. See also 91 Cong. Rec. 1443. To the extent, therefore, that "the individual states, with their limited territorial jurisdictions [were] not fully capable of governing" insurance "transactions which, reaching across state boundaries, affect the people of more states than one," that condition necessarily continued after enactment of the McCarran-Ferguson Act. The result, in the absence of federal regulation to fill the void, is a legal vacuum—a "no man's land" which is not effectively regulated either by the states or by the federal government.

This was recognized by the court below, which acknowledged that "[t]here is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is

a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation" (*infra,* p. 32). The court, however, denied "that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be" (*ibid.*). Under the court's construction of the proviso to Section 2 (b), the Commission's jurisdiction in the field is limited, irrespective of any other factor, to those states which have not enacted legislation relating to insurance advertising.

In so holding, the court treated the proviso to Section 2 (b) as "the only express grant of power to the Federal Trade Commission over the business of insurance contained in the Act" (*infra,* p. 32). But the Commission's jurisdiction over interstate commerce (including the interstate sale of insurance) is derived from its organic statute, the Federal Trade Commission Act. The question is, therefore, not whether the McCarran-Ferguson Act confers on the Commission jurisdiction over the business of insurance, but whether the Act divests the Commission of the jurisdiction over the multi-state activities of insurance companies which it would otherwise have by virtue of the Federal Trade Commission Act and the *South-Eastern Underwriters* decision. In the Commission's view, to conclude that Congress intended to effect such a divestiture would require far more explicit language than is contained in the proviso to Section 2 (b). Particularly is this so in view of this Court's admonition that exceptions to the anti-trust laws are to be strictly construed. See, *e. g., United States* v. *McKesson & Robbins Co.,* 351 U. S. 305, 316.

In *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, 429–430, the Court recognized that Congress' purpose in enacting the McCarran-Ferguson Act "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation," and by affirmatively declaring the business of insurance to be subject to state regulation and taxation. This purpose is completely consistent with the Commission's action in undertaking to stop false and misleading advertising in the interstate sale of insurance policies.

The Commission, it should be noted, is not attempting to apply a federal statute which conflicts with state legislation.[10] Nor is the Commission here asserting that a federal statute supersedes or invalidates

[10] As an example of inconsistency between federal and state regulation, it is recognized that application of the Federal Trade Commission Act to proscribe rate-fixing among insurance companies would be in conflict with a state enactment authorizing such rate-fixing agreements, and that in the event of such conflict the state enactment would prevail. See *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange*, 181 F. 2d 174 (C. A. 8), certiorari denied, 340 U. S. 823. Such, however, is not the situation in the instant case; there is no conflict between the Federal Trade Commission Act and the state enactments prohibiting false and misleading advertising. Nor is it probable that a conflict would ever arise in the administration of these laws. Of course, in the unlikely event that such a conflict did develop, the state adjudication would presumably be controlling in accord with the principle of the *North Little Rock Transportation Co.* case, *supra*.

state legislation in any way. Instead, all that the Commission contends is that Congress has not divested it of authority under the Federal Trade Commission Act to join with the states in order to provide full protection to the public. Such federal authority would serve to fill the jurisdictional void which the court below apparently concedes would exist under its decision.

Concurrent and complementary regulation of this nature is in no sense unusual in the area of trade regulation, as the Commission pointed out (*infra*, pp. 54–55). Indeed, in the *Benjamin* case itself, this Court pointed out (p. 439), referring to "the division of legislative power into the respective spheres of federal and state authority", that "They were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion." See also, *e. g.*, *Hoke* v. *United States*, 227 U. S. 308, 322.

This case illustrates the difficulties of enforcement if the mere enactment of state statutes relating to issuance advertising is sufficient to oust the Commission of jurisdiction. National disseminates, by mail and other means, advertising material to prospective customers located in all 48 states (as well as the District of Columbia and Hawaii), either directly or through various agents of the company. The problem presented by the case is thus nation-wide in its impact, but the states, acting individually, can not adequately cope with this problem. State insurance laws generally do not even purport to regulate the business of insurance

beyond the borders of the state (*e. g.*, Insurance Code of Michigan, 1956, c. 20, Sections 24.12001–24.12050). And, even assuming that these laws did purport to do so, it is doubtful that citizens of the other 47 states could thereby receive adequate protection.

As Congress recognized in enacting the McCarran-Ferguson Act (H. Rep. No. 143, 79th Cong., 1st Sess., p. 3; 91 Cong. Rec. 1442), the Fourteenth Amendment imposes substantial limitations on the power of the states to regulate out-of-state transactions. See, *e. g.*, *Allgeyer* v. *Louisiana*, 165 U. S. 578; *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357. These limitations have not been eliminated as a result of later decisions of this Court. See, *e. g.*, *Osborn* v. *Ozlin*, 310 U. S. 53, 62; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313; *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643.

In addition, wholly apart from constitutional limitations, the authorities of one state can hardly be expected to devote their necessarily limited financial and manpower resources to the investigation and prosecution of misrepresentations made to the citizens of the other 47 states. "And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Assn.* v. *Virginia*, *supra*, at 649, citing *Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407, 418, 419, and *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 619. On the other hand, any attempt by one of the other 47 states to deal inside its

boundaries with advertising originating elsewhere would fail to get at the source of the evil; it would deal only with a symptom rather than the cause.

The problem is even more acute where an insurance company employs no local agents and has no office or assets within the state. In those circumstances, there would seem to be no way in which a state could protect itself from false advertising disseminated from out-of-state points through the media of the United States mails (as in the instant case), newspapers, magazines, radio, or television.[11] Yet, under the decision below, the Commission is precluded from acting even in that situation, so long as the states involved have enacted legislation relating to insurance advertising.

---

[11] Compare *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643. There this Court, in connection with an insurer located in Nebraska and engaged in the mail-order health insurance business, held that Virginia "has power to issue a 'cease and desist order' enforcing at least that regulatory provision requiring the Association to accept service of process by Virginia claimants on the Secretary of the Commonwealth." *Id.* at 647. In so holding, the Court placed emphasis on "the unpaid activities of those already members, who are encouraged to recommend the Association to friends and submit their names to the home office." *Id.* at 646, 648. See also the concurring opinion of Mr. Justice Douglas, *id.* at 653–654: "A state is helpless when the out-of-state company operates beyond the borders, establishes no office in the state, and has no agents, salesmen, or solicitors to obtain business for it within the state. Then it is beyond the reach of process. In the present case, however, that is only the formal arrangement. The actual arrangement shows a method of soliciting business within Virginia as active, continuous, and methodical as it would be if regular agents or solicitors were employed."

3. The legislative history of the McCarran-Ferguson Act affords no basis, we believe, for any assumption that Congress intended to establish this legal vacuum—this "no man's land"—between federal and state authority. On the contrary, both the House and Senate reports on the bill emphasize that the purpose of the legislation was "to secure adequate regulation and control of the insurance business". S. Rep. No. 20, 79th Cong., 1st Sess., p. 2; H. Rep. No. 143, 79th Cong., 1st Sess., p. 2. As already shown, that purpose cannot be accomplished under the construction adopted by the court below, which leaves the advertising practices of insurance companies beyond the scope of effective regulation where such companies operate on a nationwide or multi-state scale.

Apart from this statement of purpose, the reports contain nothing dealing directly with the question presented here. The court below, however, relied upon certain general remarks made by Senator McCarran on the floor of the Senate (*infra*, pp. 34–35). But these remarks must be read in conjunction with the statements of the other draftsmen of the proviso to Section 2 (b). Senator O'Mahoney, one of the Senate managers, gave specific assurances that the Federal Trade Commission Act and the other Acts included in the moratory provision would become fully applicable upon the expiration of the moratorium, and that the bill would not delegate to any state the power to legislate in the field of interstate or foreign commerce. 91 Cong. Rec. 1483. Senator Ferguson, cosponsor of the bill and also one of the Senate managers, stated: "If the Senator's statement was that

the proposed act would permit a State to regulate interstate commerce—insurance is interstate commerce—in the various States, the State could not do it." 91 Cong. Rec. 1484. And, on the House side, there is no legislative history whatever supporting the decision below.

Moreover, even the remarks of Senator McCarran are not unambiguous. During the Senate debates, no reference was made to the regulation of false and misleading advertising. Rather, the problem to which attention was directed was the impact on the Sherman Act of state laws authorizing conduct (*e. g.*, rate-fixing) which, apart from the McCarran-Ferguson Act, would be in violation of the Sherman Act. 91 Cong. Rec. 1442–1444, 1477–1488. As already pointed out, we are concerned here with the quite different matter of a federal statute which is wholly consistent with the state legislation. In the absence of a conflict, the legislative history when considered as a whole cannot be read as expressing a Congressional consensus that the Commission should be effectively barred from policing the channels of interstate commerce to protect the public against deception in this important area.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
EARL E. POLLOCK,
Assistant to the Solicitor General.
EARL W. KINTNER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
ALVIN L. BERMAN,
Attorney,
Federal Trade Commission.

SEPTEMBER 1957.

APPENDIX A

No. 12944

In the United States Court of Appeals for the Sixth Circuit

NATIONAL CASUALTY COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Decided June 6, 1957

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Before SIMONS, *Chief Judge,* ALLEN and MILLER, *Circuit Judges.*

MILLER, *Circuit Judge:* The petitioner seeks a review of an order of the Federal Trade Commission requiring the petitioner to cease and desist from engaging in acts and practices in the conduct of its insurance business found by the Commission to be unfair and deceptive, in violation of the Federal Trade Commission Act, as amended. Sec. 45 (a) (1) (6) and (c), Title 15, U. S. Code.

The complaint filed by the Commission alleged that the petitioner in the course of its interstate business of selling accident and health insurance and for the purpose of inducing purchases of such insurance policies, was making statements and representations concerning the benefits of said policies of insurance which were false and deceptive, were to the

prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act. Petitioner by its answer admitted that it had advertised its accident and health insurance policies as charged in the complaint, but denied that its advertising was false or misleading, or was to the prejudice and injury of the public, or that it had violated the Federal Trade Commission Act. The petitioner affirmatively alleged that the Commission was without jurisdiction over its interstate insurance business because of state statutes regulating unfair and deceptive acts or practices within the respective boundaries of the states, within the scope and meaning of the McCarran Act, Sections 1011–1015, Title 15, U. S. Code.

At the hearings which followed, the facts were shown to be as follows. Petitioner is a stock company incorporated under the laws of Michigan for the purpose of selling accident, health and all types of casualty insurance, with its principal office in Detroit, Michigan. It is licensed to sell such policies in all states of the United States, the District of Columbia and Hawaii, through resident agents located therein. It sells its insurance policies by solicitation from 350 to 400 direct, but independent, insurance agents throughout the nation, who operate under contract on commission only. Petitioner prepares and sends to these agents direct-mailing cards, advertising material and applications. The agents mail locally or distribute personally this material to likely prospects, secure leads thereby and then call and personally solicit the prospect. A small percent of direct mail advertising is sent by peti-

tioner from its offices in Detroit to the public. 80% or more of petitioners' accident and health policies are issued by it from its home office after receipt, checking and consideration by it of the prospect's signed application which has been secured by the agent. Any policy issued by petitioner is forwarded to the agent for delivery to the insured. Premium notice forms are printed by the petitioner and furnished to the agents who mail them out locally. Premium collection is the agent's responsibility, only 5% or less being remitted directly to the petitioner in cases of unusual or temporary situations.

The Hearing Examiner held that four of the five categories of advertising set forth in the complaint were unfair and deceptive as alleged. He held that the Commission's overall interstate jurisdiction was limited to the four states and the District of Columbia which had no statute regulating unfair or deceptive acts or practices in the business of insurance within their respective boundaries. He also held that the Commission had jurisdiction in all states over the advertising practices of petitioner to the extent that its deceptive advertising material was disseminated by the petitioner by the use of the United States mails. He issued a Cease and Desist order to that effect.

Upon appeal, the Commission reversed the Examiner in part, holding by a three-to-two decision that it had full jurisdiction over the interstate sale of insurance by means of unfair and deceptive advertising practices, irrespective of whether the state had adopted a local law regulating such practices within its boundaries. Since, in our opinion, this case will be disposed of on the jurisdictional issue, it is unnec-

essary to discuss petitioner's contentions that its advertising was not false or misleading and that the proceeding and the issuance of a Cease and Desist order did not serve any public interest. The jurisdictional question involves the construction and application of the McCarran Act referred to above.

The background giving rise to the McCarran Act is important.

In 1869, the Supreme Court upheld the validity of a Virginia statute which regulated foreign insurance companies, on the ground that the statute did not offend the Commerce Clause of the U. S. Constitution because "issuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia,* 8 Wall. 168, 183. Thereafter, in similar cases, the Supreme Court consistently ruled that the business of insurance was not commerce. In *New York Life Insurance Company* v. *Deer Lodge County,* 231 U. S. 495, 503-504, 510, the Supreme Court, as late as 1913, held to this view, stating in its opinion in that case that "contracts of insurance are not commerce at all, neither state nor interstate." However, in 1944, the Supreme Court in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, a case involving alleged violations of the Sherman Anti-Trust Act, again considered the question and in a four-to-three decision, held that the business of insurance conducted across state lines was interstate commerce subject to regulation by Congress under the Commerce Clause.

The Supreme Court's decision was vigorously protested in the insurance field. The insurance companies, relying upon the court's previous rulings, had engaged in practices which were prohibited under the federal anti-trust laws but which were permitted

under the laws and regulations of the various states. The states feared the loss of large revenues under their laws taxing insurance sold within the states, which, under the new ruling, might be held discriminatory of interstate commerce and, therefore, unconstitutional. As a result of this vigorous reaction to the decision, Congress passed the so-called McCarran Act of 1945. This Act provides in part as follows:

> SEC. 1. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of taxation of such business by the several States.
>
> SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> SEC. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the

Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

The petitioner contends that the purpose of the Act was generally to restore the insurance business to the situation existing prior to the decision in the *South-Eastern Underwriters* case, and that in states in which the insurance business was regulated by state law, such business was not subject to regulation by the Federal Trade Commission.

The Commission does not challenge the validity of any state statute regulating the business of insurance, nor the validity of the McCarran Act. It points out that state laws have no extra-territorial effect and cannot regulate the business of insurance beyond the borders of the particular state; that prior to the *South-Eastern Underwriters Association* case, the states were authorized to regulate the intrastate aspects of the insurance business, even though state regulation might affect interstate commerce in insurance; that following the decision in the *South-Eastern*

Underwriters Association case there was a field of interstate business of insurance which the states could not regulate and which Congress did not intend to leave unregulated; that in enacting the McCarran Act, Congress intended only to authorize the states to exercise their police power in the same manner they had exercised it when the business of insurance was not considered to be commerce, and gave the states until January 1, 1948, later extended by statute to June 30, 1948, in which to define a reasonable area of state police power, beyond which they could not go; that after that date the Commission was authorized to regulate insurance on different grounds, namely, regulating the use of the interstate channels of commerce; and that the Federal and state laws in the field of insurance supplement and reinforce one another in order to provide full protection to the public.

The wording of the Act clearly indicates that, regardless of the ruling in the *South-Eastern Underwriters Association* case, Congress did not intend to take from the states the regulation of insurance within the state. Section 1 declares that "the *continued* regulation * * * by the several states of the business of insurance is in the public interest, * * *." [Emphasis added.] Section 2 states, "The business of insurance * * * shall be subject to the laws of the several states which relate to the regulation or taxation of such business." The real question is, to what extent, if any, did Congress provide for federal regulation in addition to state regulation.

The Act is equally clear, by the express wording of Section 3, that until January 1, 1948, subsequently extended by amendment to June 30, 1948, the business of insurance was not subject to the Federal Trade

Commission Act or certain other federal regulatory acts. After January 1, 1948, according to Section 2 of the Act, the Federal Trade Commission Act and the Sherman and Clayton Acts were made "applicable to the business of insurance to the extent that such business is not regulated by state law." That is the only express grant of power to the Federal Trade Commission over the business of insurance contained in the Act. It is a grant expressly limited by its terms to insurance business which "is not regulated by state law." We do not find in those words the "clear and specific grant of jurisdiction" to the Federal Trade Commission which the Commission claims is given to it by the Act. On the contrary, we find the logical and reasonable conclusion from the two sections to be that jurisdiction over the business of insurance was granted to the Federal Trade Commission after January 1, 1948, *only* where the business was not regulated by state law.

There is some merit in the Commission's contention that since the decision in the *South-Eastern Underwriters Association* case there is a field of interstate insurance, outside the jurisdiction of the states, which should be subject to federal regulation. But it does not follow that it was the purpose of the McCarran Act to accomplish such result, desirable though it might be. Congress realized that by reason of the Supreme Court decision federal jurisdiction existed over the interstate business of insurance. The enactment of the McCarran Act was to correct that situation. It expressly prohibited the exercise of such jurisdiction for a period of approximately three years. After that period it made a restrictive grant of jurisdiction. In order to sustain the contention of

the Commission, we must imply a broader grant of jurisdiction to the Commission after the three-year period than is contained in the express words of the Act. We do not believe that Congress would leave to implication such an important segment of the overall question of jurisdiction which it was dealing with, when it could easily have been provided for by express words. A construction of the Act does not sustain the contention.

Section 4 of the Act provides that nothing contained in the Act shall be construed to affect the application to the business of insurance of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act. If it was intended by the Act to retain in or give to the agencies of the Federal Government jurisdiction over insurance companies engaged in interstate commerce, irrespective of its regulation by state law, this section of the Act was unnecessary and meaningless since the acts referred to would be applicable by reason of the Supreme Court's decision without the provisions of Section 4.

It is probable that in the regulation of the business of insurance by both the federal and state governments there will develop a conflict of policies. The parties agree that in such event the federal regulation would control. If so, "the continued regulation and taxation by the several states," referred to in Section 1 of the Act as being in the public interest, would no longer exist.

The general purpose of restoring to the states the right to regulate the business of insurance as it existed prior to the 1944 decision was carried out by the moratorium provided by the Act until January 1, 1948. During the moratorium there was no jurisdic-

tion over the business of insurance in the Commission. During that period the states which did not have such laws had the necessary time in which to pass regulatory legislation. The tie-in between the moratorium and the obvious invitation to enact regulatory legislation while it existed, both recognized the need of regulating the business of insurance and indicated an intention to permit the states to do it to the exclusion of the federal government if they elected to do so. It seems more logical to conclude that it was the purpose of the moratorium to deprive the federal agencies of their newly acquired jurisdiction over the business of insurance in order to restore such jurisdiction to the states if they elected to assume it, than to conclude that it was the purpose of the moratorium to deprive the agencies of their newly acquired jurisdiction for only a short period of time after which it would be given back to them regardless of what the states did in the meantime.

This construction of the Act is in accord with statements by Senator McCarran on the floor of the Senate on February 26 and 27, 1945, in connection with the Senate's consideration of the Conference Report on S. 340. Senator McCarran stated: "The moratorium would not be continued, but if in the meantime the states themselves had regulated the business of insurance, the Sherman and Clayton Acts and the other acts would not become effective." He also said: "During the 3-year moratorium the states may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate, they will have taken the business of insurance out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts.

If during the moratorium the states do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable." 91 Cong. Rec. 1442–1444.

The Supreme Court, since the passage of the Act, has expressed similar views. In *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 429–431, the court said: "obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." It referred to the nation-wide existence of state systems of regulation and taxation and to the great difference in scope and character of the regulations imposed and of the taxes exacted. It then said: "Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." Continuing with the discussion, it later said, "* * * it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." In a later case, *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409–413, the court said: "Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, might be found to have on state regulation of insurance." In *Wilburn Boat Co.* v. *Fireman's Insurance Co.,* 348

U. S. 310, 319, the court in reviewing the enactment of the McCarran Act said: "Passage of the bill followed *United States* v. *South-Eastern Underwriters Assn., supra,* holding that, despite the constitutional doctrine embodied in the *Paul* v. *Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *South-Eastern* case, however, all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue."

In making its ruling the Commission followed its prior ruling in *The American Hospital and Life Insurance Company* case, which at that time had not been reviewed by the Court of Appeals. On April 9, 1957, following the argument on appeal and submission of the present case, the Court of Appeals for the Fifth Circuit handed down its opinion on its review holding that the Commission was without jurisdiction in the matter and setting aside the Cease-and-Desist Order in that case. *The American Hospital and Life Insurance Co.* v. *Federal Trade Commission,* * * * F. (2d) * * *, C. A. 5th. We agree with the ruling of the Court of Appeals in that case.

We are of the opinion that the Federal Trade Commission was without jurisdiction to regulate the insurance business of the petitioner in those states where such business is regulated by state law. The order of the Commission is set aside and the case remanded to the Commission for further proceedings consistent with this opinion.

APPENDIX B

In the United States Court of Appeals for the Sixth Circuit

No. 12944

NATIONAL CASUALTY COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

(Filed June 6, 1957)

ORDER

Before SIMONS, *Chief Judge;* ALLEN and MILLER, *Circuit Judges.*

On petition to review an order of the Federal Trade Commission,

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration Whereof, It is now ordered, adjudged and decreed that the order of the Federal Trade Commission be and it is set aside and the case is remanded to the Federal Trade Commission for further proceedings consistent with the opinion herein.

Approved for entry:

[SEAL] /s/ SHACKELFORD MILLER, Jr.,
United States Circuit Judge.

A true copy.

Attest:

CARL W. REUSS, *Clerk.*
By /s/ GRACE KELLER,
Deputy Clerk.

APPENDIX C

In the Supreme Court of the United States

No. ——, October Term, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

NATIONAL CASUALTY COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 6th, 1957.

(Sgd) WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of August 1957.

APPENDIX D

United States of America

Before Federal Trade Commission

Commissioners:

John W. Gwynne, Chairman
Lowell B. Mason
Robert T. Secrest
Sigurd Anderson
William C. Kern

Docket No. 6237

In the Matter of

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, A CORPORATION

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

Counsel in support of the complaint issued in this proceeding has appealed from the hearing examiner's initial decision, in which, after holding that Public Law 15 of the 79th Congress (McCarran-Ferguson Insurance Regulation Act) [1] limits the Federal Trade Commission's jurisdiction herein to respondent's activities in the State of Mississippi, he dismissed the complaint for failure of proof.

Respondent, a Texas corporation, is licensed to conduct, and does conduct, a health-and-accident insurance business in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi,

[1] 59 Stat. 33 (1945); 15 U. S. C. 1011ff.

Missouri, New Mexico, Oklahoma, Tennessee, and Texas. It sells its health-and-accident insurance policies exclusively through licensed agents in each of those States, and its only advertising consists of printed brochures, which it mails from its home office in San Antonio, Texas, to its agents in other States for display or distribution to prospective policyholders in the course of sales interviews. Applications secured by respondent's agents in States other than Texas are mailed to respondent's home office, where the policies are issued and mailed to the agents for delivery to the new policyholders. The complaint alleged that respondent's advertising contains various false, misleading and deceptive representations in violation of the Federal Trade Commission Act. Respondent maintains that all States in which it carries on its operations have laws that forbid it or its agents to make misrepresentations in the course of selling its insurance and that under the McCarran-Ferguson Act this is sufficient to remove it from the scope of the Federal Trade Commission Act.

Thus at the threshold of our consideration of this appeal we face an important jurisdictional question. The basis of the hearing examiner's holding that the Commission's jurisdiction extends to respondent's transactions in Mississippi alone is that each of the other States where it advertises or sells its insurance policies (saving from consideration respondent's home State of Texas, inasmuch as jurisdiction has not been asserted over respondent's business transacted wholly within that State) fully regulates the business of insurance by legislative enactment and that to the extent such regulation exists our jurisdiction has been withdrawn by the McCarran-Ferguson Act.

That statute[2] directly and expressly provides that after January 1, 1948, the Federal Trade Commission Act shall apply to the business of insurance "to the extent that such business is not regulated by State law." In the judgment of the examiner, the Commission's jurisdiction over the commercial activities of insurance companies is contingent upon an absence of State regulatory legislation. Implicit in that view is the proposition that the sum of jurisdiction—State and Federal—over commerce is no more than the aggregate of the several State jurisdictions. We need scarcely point out that such a concept not only neglects the exclusive Federal jurisdiction over commerce *among* the States, conferred by Section 3 of Article 1 of the Constitution of the United States, but is incon-

[2] The McCarran-Ferguson Act reads in full text as follows:

"AN ACT To express the intent of the Congress with reference to the regulation of the business of insurance.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914,

sistent with the fundamental constitutional doctrine of the separation of State and Federal powers.

We do not think that the McCarran-Ferguson Act, considered solely by its terms or along with its legislative history and judicial interpretation admits of such a construction.

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), the Supreme Court in effect overturned *Paul* v. *Virginia*, 75 U. S. 168 (1868), and the line of related cases, all of which

---

known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

"SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

were bottomed on the principle that contracts of insurance are not commerce, either interstate or *intrastate,* and declared that the conduct of fire insurance business across State lines is "Commerce among the several States" and accordingly a conspiracy to monopolize interstate trade and commerce in that business violates the Sherman Antitrust Act. At the same time the Court pointed out that, for constitutional purposes, certain activities of a business may be *intra*state and hence subject to State control, while other activities of the same business may be interstate and subject to Federal regulation. However, the Court did not attempt to decide which State laws were applicable to the business of insurance and to what extent they were not applicable. A local insurance company which sold only within the State was clearly subject to the State laws, but the extent to which a company doing an interstate business was subject to State laws was not made clear.

The McCarran-Ferguson Act was enacted the year following *South-Eastern Underwriters.* Its title states that it is an act to express the intent of Congress with reference to the regulation of the business of insurance. The title does not suggest that Congress was undertaking to give any additional jurisdiction to the States or to take any away; it indicates rather an intent to avoid any ambiguity arising out of the Congressional silence. It appears that the McCarran-Ferguson Act was designed to permit the States to regulate, *in the traditional manner,* the business of insurance. It was not designed to permit insurance companies to secure new business by false or misleading advertising in interstate commerce, nor was it intended as an abdication of Federal jurisdiction under the Sherman, Clayton, and Federal Trade Com-

mission Acts over the business of insurance. Had Congress desired to remove the business of insurance from the scope of these laws, it could have done so by simply providing that for the purpose of those statutes the business of insurance across State lines should not be deemed to be "Commerce among the several States." Quite to the contrary, it expressly applied those laws to the business of insurance within certain limits.[3]

The first section of the Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest," and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "Continued regulation" again conveys the idea that Congress did not intend to give anything to the States that they did not already possess. Silence on the part of Congress was not to be construed as imposing any

---

[3] The original version of the McCarran-Ferguson Act, as reported by the committees of the respective Houses of Congress, provided flatly that neither the Federal Trade Commission Act nor the Robinson-Patman Act should "apply to the business of insurance or to acts in the conduct of that business." In debate on the floor of the House the wisdom of such an exclusion was questioned (91 Cong. Rec. 1027), and the Chairman of the House Committee on the Judiciary offered to propose to the Joint Committee of Conference the elimination of the exclusionary section and the inclusion of the Federal Trade Commission Act in the moratory section, thus making the Federal Trade Commission Act applicable to the insurance business, along with the Sherman and Clayton Acts, after 1947. No opposition to this proposal was voiced on the floor. The conference committee adopted the suggestion, with the result that the Federal Trade Commission Act was to apply to the business of insurance upon lapse of the moratorium.

barrier to State regulation. That is not to say, however, that there were to be no *other* barriers to or limitatons upon State regulation: areas in which the States could never regulate were not dealt with one way or the other.

In construing the meaning of this section, it is to be borne in mind that under the commerce clause of the Federal Constitution Congress not only has exclusive power to regulate interstate commerce but in exercising that power can even regulate *intra*state activities which affect interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942). When Congress enters this intermediate zone and legislates fully on a given subject, the Federal statute, "*ipso facto*, supersedes existing state legislation on the same subject." *Southern Ry. Co.* v. *R. R. Comm., Indiana*, 236 U. S. 439, 446 (1915).

The first section must therefore mean that the continued regulation and taxation by the States of the business of insurance *to the limits of their constitutional power* is in the public interest. Certainly the States lack the power to tax or regulate purely interstate activities of insurance companies. It can only be that the section provides that State authority over *intra*state insurance business that might affect interstate insurance business could not be disturbed by Federal legislation which did not specifically mention insurance.

We now approach the determination of the proper construction of the crucial second section of the McCarran-Ferguson Act. Subsection (a) thereof makes the business of insurance and everyone engaged therein "subject to State laws relating to the regulation or taxation of such business." This is a clear pronounce-

ment that the *South-Eastern Underwriters* case does not dislodge State regulation of insurance.

The second section goes on to provide in subsection (b):

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance: * * *.

Obviously, this does not purport to give the States the power to legislate outside their jurisdiction. Nor does it interfere in any way with Federal laws covering interstate commerce over which the States could not ever claim jurisdiction, e. g., the postal statutes. See *United States* v. *Sylvanus*, 192 F. 2d 96, 100 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952). Such laws cannot impair or supersede State laws, for they do not relate to the same channels of commerce. And, under the terms of the Act, they become inoperative only if and to the extent that they impair, invalidate, or supersede State laws. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413 (1954).

Section 2 (b) continues:

> *Provided*, That after January 1, 1948, * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Even without such a proviso the Federal Trade Commission Act would have been applicable to those aspects of the business of insurance which are exclusively in interstate commerce, for that area was never reached by State law. They could not, there-

fore, be "regulated by State law." Moreover, if this proviso meant only that no action could be taken under the Federal Trade Commission Act which was in conflict with State law it was wholly unnecessary. The statute already had stated that no Act of Congress shall invalidate, impair, or supersede a State law unless it relates specifically to insurance. It is the office of a proviso "to except something from the operative effect or to qualify or restrain the generality of the substantive enactment to which it is attached." *Cox* v. *Hart,* 260 U. S. 427, 435 (1922). The proviso in the McCarran-Ferguson Act must therefore make the Federal Trade Commission Act an exception to the rule that no Federal law not relating specifically to insurance may supersede a State law enacted for the purpose of regulating the business of insurance. It must have been contemplated that under certain conditions the Federal Trade Commission Act might supersede a State law purporting to regulate the business of insurance but not covering all aspects thereof. In its application to the interstate phase of a transaction which cannot be regulated by State law, for example, the Federal law in one sense would supersede a State law covering the same subject matter in a different and local phase of the transaction.

The Federal and State laws in this field supplement and reinforce one another in order to provide full protection to the public. Indeed, it seems to us that such a view is not only consonant with but imperative to the preservation of the public interest in this domain. We fully subscribe to the principle that the Federal Government ought not encumber the States in wielding the maximum of their sovereign

powers over the business of insurance. This we understand to be the essential aim of the McCarran-Ferguson Act. But, in the absence of a far stronger and more positive commandment than that statute lays down, we cannot be persuaded that, as to the business of insurance, the Federal authority has been ousted from the interstate regulatory sphere. It surely could not have been the Congressional intent to create a legal vacuum wherein an insurance company would have been enabled to escape regulation of the interstate aspects of its business in cases in which the Federal and State laws did not conflict.

We observe that Section 3 (a) of the McCarran-Ferguson Act is a moratory clause suspending the application of the Federal Trade Commission, Sherman, Clayton, and Robinson-Patman Acts to the business of insurance for nearly three years. If those statutes were not to "apply *to the business of insurance* or *to acts in the conduct thereof*" until January 1, 1948, we think it logically follows that they were to apply to that business and to those acts after the prescribed date. Thus this subsection, as well as Section 2 (b), is inconsistent with any notion that the Commission's jurisdiction over the interstate aspects of the insurance business was repealed.

In withdrawing Federal jurisdiction under the Federal Trade Commission, Sherman, Clayton and Robinson-Patman Acts over the business of insurance for nearly three years, Congress apparently was attempting to eliminate arguments by insurance companies that Federal regulation alone was adequate and that State regulations were burdening interstate commerce. Congress gave the States about three years in which to define a reasonable area of State

police power. Beyond that reasonable area States could not go. Regardless of whether a State regulated insurance during this time, after 1947 the Federal Trade Commission was expressly authorized to regulate it on different grounds, namely, regulating the use of the interstate channels of commerce.

Since the Court in the *South-Eastern Underwriters* case had said that insurance sold by a company in one State to a customer in another State was in interstate commerce, this type of transaction was subject to the jurisdiction of the Commission. During the moratorium, Congress intended that the Commission not exercise its jurisdiction. After that period the Federal Trade Commission Act was again to apply, to the extent that the business of insurance was not regulated by State law. Since the States were given no new jurisdiction, State law could regulate the business of insurance only to the extent possible before the *South-Eastern Underwriters* decision. And, as the Court recognized in that case, there were elements of interstate transactions which the States could not regulate.[4]

The legislative history of the McCarran-Ferguson Act supports the foregoing conclusion. We believe this legislative history shows plainly that in enacting that measure Congress was concerned only with ensuring that State laws regulating the business of insurance should not be superseded in the zone of

---

[4] "The power granted to Congress [by the Commerce Clause] is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states that one—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." 322 U. S. at 552.

"affecting interstate commerce" by Federal legislation not expressly relating to insurance. Thus we find in the reports of the committees of both Houses of Congress this statement:

> Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.
>
> Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds. [Sen. Rep. No. 20, 79th Cong., 1st Sess., 1–2; H. R. Rep. No. 143, 79th Cong., 1st Sess., 2.]

But authority to regulate the interstate aspects of the business of insurance was to remain with the Federal Government, as can be seen from the following

statement in the House Committee report, which was quoted with approval by Senator McCarran in floor debate on the bill (91 Cong. Rec. 1443):

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 277) * * *. [H. R. Rep. 143, 79th Cong., 1st Sess., 3.]

The three cases last cited in the foregoing excerpt all hold that a State's power to tax insurance activities is limited to transactions occurring within its boundaries. We would be hard put to account for the reference to these decisions if the purpose of the McCarran-Ferguson Act were to substitute and exclusive State power for the Federal Trade Commission's jurisdiction over the interstate aspects of the insurance business.

We are confirmed in our belief to the contrary by the decision of *United States* v. *Sylvanus*, 192 F. 2d 96 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952), wherein the Court held that the McCarran-Ferguson Act did not abolish Federal jurisdiction under the postal laws to prosecute for mail fraud

committed in the sale of insurance in a State having its own statutes regulating that business. The Court carefully distinguished the interstate and *intra*state aspects of the defendant's deceptive practices:

> [I]t can not properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails, over which the Congress has, by the Constitution, paramount power and authority. It matters not that the alleged fraudulent actors might be prosecuted under the law of Illinois. The indictment charges simply that acts of deception amounting to a scheme to defraud have been committed by defendants, in conducting their authorized business, and that defendants have availed themselves of the mails in execution or attempted execution of the scheme. It is immaterial that the fraudulent plan itself is outside the jurisdiction of Congress, *Badders* v. *U. S.*, 240 U. S. 391 * * *, or that the scheme charged involved a transaction forbidden by the laws of the state. *O'Hara* v. *U. S.*, 6 Cir., 129 F. 551.
>
> We conclude, then, that it was not the intent of the Congress, by its passage of the McCarran Act, to surrender control of the use of the mails or to cease to authorize the federal courts to determine whether the mails have been utilized in attempted execution of a scheme to

> defraud and that the district court, by entertaining jurisdiction, did not interfere with regulation of the insurance company by the state but properly overruled the motions to dismiss the indictment. [192 F. 2d at 100.]

Unlike the Federal Trade Commission Act, the postal laws were not expressly brought by the McCarran-Ferguson Act to bear on the business of insurance. Indeed, that statute declares that *no* Act of Congress not specifically relating to the business of insurance shall be construed to invalidate, impair, or supersede any State law regulating that business. Yet in the *Sylvanus* decision, *supra,* the Court held that a postal statute banning a course of conduct which in its *intra*state aspects constituted a State offense was unaffected by the McCarran-Ferguson Act.

All the more, then, under the Federal Trade Commission Act, which the McCarran-Ferguson Act made applicable to the business of insurance, there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation "to the extent that such business is not regulated by State law" is inoperative.

A State can revoke an insurance corporation's charter or license, thus affecting interstate commerce to some degree. To the extent necessary to enable it effectively to exercise its police power the State can take action having consequences in other jurisdictions, and the Federal Trade Commission could not prohibit such regulation. And the text and history of the McCarran-Ferguson Act leave no doubt that the power of the States to tax, or to fix rates for, insurance companies doing business within their territories was

in no way to be invalidated, impaired, or superseded by Federal law. However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those State functions, and we do not believe that the Federal Trade Commission Act, when read in conjunction with the McCarran-Ferguson Act, can be properly interpreted to interfere with the taxing or rate-fixing powers.

By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses. The McCarran-Ferguson Act was passed to enable them to continue such regulation. *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409, 413 (1954).

The principle that the Commission may proceed against a practice that may simultaneously be the object of State regulation is one of long standing.[5] Thus the Commission's orders prohibiting the interstate shipment of lottery devices to be used in selling merchandise have been universally upheld on judicial review despite the fact that such devices are not put to their intended use until they have left the channels

[5] As recently as April 2, 1955, the Supreme Court of the United States reaffirmed this principle in *Pennsylvania* v. *Nelson,* 350 U. S. 497, declaring that where the Federal Government had occupied the field of protecting against sedition, States were not thereby prevented "from prosecuting where the same act constitutes both a Federal and a State offense under the police power * * *."

of interstate commerce (just as the respondent's brochures are not displayed for sales purposes until they have come to rest in the hands of respondent's agent within a State). See *Seymour Sales Co.* v. *FTC*, 216 F. 2d 633, 635–6 (D. C. Cir. 1954), *cert. denied* 348 U. S. 928 (1955), and cases therein cited. The idea of a field of enforcement divided between Federal and State Governments is embedded in a number of statutes, in addition to the McCarran-Ferguson Act. Examples of these are Acts dealing with the sale of liquor (the Wilson Act, 26 Stat. 313, and the Webb-Kenyon Act, 33 Stat. 699), convict-made goods (the Hawes-Cooper Act, 45 Stat. 1084, and the Ashurst-Sommers Act, 49 Stat. 494), oleomargarine (32 Stat. 193), diseased plants (44 Stat. 98), black bass (64 Stat. 845), whaling (49 Stat. 1246), prizefight films (54 Stat. 686), and the Federal Power Act (49 Stat. 838).

In view of our foregoing consideration of the terms, legislative history, and judicial interpretation of the McCarran-Ferguson Act, we do not think the statute admits of the construction placed on it by the hearing examiner.

Respondent points out that it did not send its advertising materials to sales prospects but mailed them to its own agents in various States for local use, and that hence its advertising occurred only in *intra*state commerce. We consider such an analysis factitious and unrealistic. Respondent's annual premium collections on health-and-accident insurance sold by its agents throughout fourteen States amount to about $2,750,000. It employs an indisputable channel of interstate commerce, the mails, for sending advertising materials to its agents, receiving applications for insurance from them, and forwarding the issued policies

to them for delivery to policyholders. The actual interview of a prospect, though it necessarily happens at a fixed geographical point within some State, cannot be isolated from the remainder of respondent's established course of dealing. By preparing its brochures and furnishing them, by mail, to its agents in various States for their use in sales presentations, respondent engages in an interstate commercial practice that must be viewed as a whole and not compartmentalized. *Consolidated Manufacturing Co.* v. *FTC*, 199 F. 2d 417, 418 (4th Cir. 1952).

Under the Federal Trade Commission Act, one who sells through agents in other than his home State must answer for deceptive advertising which he supplies to his agents, even though such representations are by necessity conveyed to the public within a particular State. *General Motors Co.* v. *FTC*. 114 F. 2d 33, 36 (2d Cir. 1940); *Ford Motor Co.* v. *FTC*, 120 F. 2d 175, 183 (6th Cir. 1941).

The Commission is accordingly of the opinion that the hearing examiner erred in not holding that the Commission had jurisdiction over such of respondent's practices in interstate commerce as might be found to be unfair or deceptive, irrespective of the existence of State statutes applicable to the *intra*state elements of such practices.

We turn now to the appeal from the hearing examiner's dismissal of the complaint for lack of substantial evidence.

Respondent was charged with falsely representing, among other things, the indemnification provided by its policies might continue to the age of sixty, or for an indefinite period, at the option of the insured. The sole evidence adduced on this allegation consists of brochures which state as follows, or similarly:

NO AGE PROVISION terminating or reducing benefits because of increasing age,

and—

POLICY FORM ASA Issued to Men and Women, ages 18 to 60.

Only persons engaged in non-hazardous occupations are eligible and all applicants must be in good health.

We do not believe that these two statements, separately or together, particularly in the absence of assertions of lifetime duration or any other definite period of coverage, can be reasonably read as meaning more than that respondent's policies contain no provisions terminating or reducing benefits on account of increasing age and that applicants for such policies must be within the age limits specified. It is true that respondent's accident-and-health policies are *term* contracts renewable at the option of the company on the premium data. However, nothing to the contrary is expressed or reasonably implied in the aforequoted statements and we therefore discern therein no capacity or tendency to deceive. We uphold the hearing examiner's dismissal of the complaint in this respect.

Respondent was next charged with falsely representing that its policies provide indemnification for all illness or accidents. To prove this charge there were introduced respondent's brochures containing broad, general representations, of which the following are typical:

CONFINING ILLNESS INDEMNITY $_____ PER MONTH

for loss of time from illness, beginning on the fourth day and continuing for one year for

each illness. (Up to two months full benefits for non-confining illness.)

Total
Accident _____per month
Disability

for loss of time from accidental injury beginning with the first day of disability and continuing for life if you are totally disabled.

Partial
Accident _____per month
Disability

for loss of time from accidental injury, beginning with the first day and continuing for period of partial disability (limit 3 months).

In conjunction with the foregoing there were introduced copies of respondent's policies containing conditions substantially limiting the illness and accident benefits advertised. The examiner found that the charges in this regard were not supported by substantial evidence, not for the reason that the representations were not proved nor that the terms of the policies did not materially limit the advertised benefits, but for a number of other reasons which are in our judgment unsound and contrary to controlling precedent.

The examiner attached great weight to the fact that the brochures in question included a statement to the effect that benefits therein described "are subject to the terms of the policy issued." We are not in accord with the examiner's view that such a notice is sufficient to correct erroneous impressions given by the representations "CONFINING ILLNESS INDEMNITY—$____per month for loss of time from illness,

beginning on the fourth day and continuing for one year for each illness," or "TOTAL ACCIDENT DISABILITY—$____ per month for loss of time from accidental injury, beginning with the first day of disability and continuing for life while you are totally disabled." Respondent's vice-president, W. C. Murphy, testified that an agent's sales kit consisted of the sales brochures, a rate book, "and, I guess, a fountain pen," and that respondent's agents are not required to carry sample policies with them. These sales brochures consist of an application form and a receipt form for the initial payment. These facts lead us to believe that many applicants do not see sample policies before executing formal applications for respondent's insurance. We consider this circumstance significant. In the context of the sales presentation, in the course of which the prospect has little or no opportunity to inspect a sample policy, the sales brochure, we are convinced, clearly has the tendency and capacity of misleading as to the extent of coverage. We disagree with the examiner's statement that if the prospect would read the entire page he would see that all benefits are subject to the terms of the policy and then if interested he would naturally inquire of the agent as to the terms. Rather it is our view that the brochure functions as a self-contained piece of advertising that of itself is likely to induce a prospect to purchase respondent's insurance.

Furthermore, we do not believe that the prospective purchaser is under any obligation to investigate the extent to which respondent's unrestricted representations of coverage for illness or accidents are untrue. "'Under repeated decisions, the purchaser is entitled to rely upon the representations made.

He need not distrust what is told him. * * * It goes without saying almost that it is extremely difficult for a layman to understand the terms and conditions of such policies as these, but whether the applicants did or did not read and understand the policies is beside the point." *United States* v. *Sylvanus,* 192 F. 2d 96, 105 (7th Cir. 1951), *cert. denied* 342 U. S. 943 (1952).

If the busy or careless businessman is entitled to protection from deceptive printed forms, even though an attentive, careful person would not be deceived thereby, *Independent Directory Corp.* v. *FTC,* 188 F. 2d 468, 470, 471 (2d Cir. 1951), it does not devolve upon respondent's prospects to ascertain the extent to which respondent's advertising may or may not exaggerate or falsify. The Federal Trade Commission Act is violated if the first contact or interview is secured by deception even though the true facts are made known to the purchaser before he enters into the contract to purchase. *Carter Products, Inc.* v. *FTC,* 186 F. 2d 821, 824 (7th Cir. 1951).

Another questionable premise in the examiner's reasoning is that "any reasonably intelligent person considering the purchase of health and accident insurance would be expected to know that health and accident policies do not ordinarily cover all illnesses and all accidents, regardless of their nature or time of origin or occurrence." Apart from the fact that the Federal Trade Commission has the duty to protect not only the "reasonably intelligent" but also the ignorant, the unthinking, the credulous, and the inexperienced, *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F. 2d 676, 679 (2d Cir. 1944), we question whether the fact asserted by the examiner to be common

knowledge—if it be a fact—is generally known even to the "Reasonably intelligent." It is certainly not beyond the realm of actuarial conceivability, not to say possibility, that in these United States in the mid-twentieth century insurance could be written which would afford protection against all illness and all accidents.

The examiner noted that no proof of actual deception was offered and declared, "Absence of such evidence justifies a presumption that none existed." Despite his disclaimer of reliance on such a presumption, it evidently was one of the considerations impelling him to dismiss these charges. This is manifest error. It was firmly established long since that actual deception of the public need not be shown in Federal Trade Commission proceedings and that representations having a capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp.* v. *FTC, supra,* 143 F. 2d at 680.

The initial decision devotes considerable space to three decisions of the Supreme Court of Mississippi, all involving private litigation, in which that Court accorded a more liberal interpretation to the conditions contained in accident and health policies similar to those here than their literal intendment would seem to justify. He concludes from these holdings that the conditions are not so burdensome as to render untrue respondent's broad representations.

The decisional law of a single State is no sure guide to the interpretations that other States may place on respondent's policies. What is more, the fact that a policyholder may eventually prevail over a respondent in an appeal from a jury trial does not rectify the deception inhering in the sales practices whereby

he was induced to purchase the insurance. He may be discouraged by the literal terms of the policy from seeking legal redress. We do not consider that the fact that if he perseveres to his State supreme court he may succeed in winning an interpretation of respondent's policy more favorable to him than the language literally warrants is a substitute for the protection assured him by the Federal Trade Commission Act.

The hearing examiner discusses at some length the reasonableness of the restrictions that respondent attaches to its illness and accident benefits. This is, of course, not germane to the question of whether respondent's representations tend to deceive and mislead.

There remain for discussion two other charges dismissed by the examiner. It was alleged that respondent had represented its hospital-and-surgical-expense policy to provide for the payment of $150 for any operation serious enough to justify such a surgeon's fee. The evidence shows that respondent disseminates a one-page advertisement which, among other things, states that the policy provides for—

SURGERY	
from $3.00 to $150.00 depending on seriousness of operation	$150.00

The policy to which this refers sets out a long schedule of the various amounts payable for specified types of surgical operations. Sixty-seven different benefits are enumerated. A mere six of these amount to $150: operations for removal of a portion of the lung, removal of kidney, removal of a portion of the vertebra, removal of entire prostate or thyroid gland, and cutting into the cranial cavity.

Only $25 is allowed for removal of tonsils and adenoids. Appraising this advertisement as it is likely to be read by unsuspecting, incautious members of the purchasing public, we gain the impression that the policy will indemnify up to a maximum sum of $150 for any surgical operation serious enough to cost such an amount. Thus, if a tonsillectomy cost $50, we would think it reasonable to expect that one insured by the policy would be protected to that extent. The advertisement is therefore deceptive and misleading in that it promises benefits which the policy does not corroborate.

Lastly, it was charged that respondent falsely represented that its hospital-and-surgical-expense policy would pay maternity benefits in addition to room service and hospital expense.

On the advertisements for this type of policy, following a listing of the benefits of room service, hospital expense, and surgery, there is shown as one of the "Additional Benefits:"

> *Maternity:* Up to $_____ after insurance has been in force for 10 months.

We would have difficulty in reading the foregoing as anything less than a representation that the maternity benefit is in *addition* to the other benefits provided by the policy. In actuality, however, the maternity benefit is provided for in a rider wherein it is specified that the maternity benefit shall be "in lieu of all other benefits provided in the policy for hospital service." Thus, far from being an *additional* benefit, it is only a *substitute* benefit, and the representation in regard thereto is hence at material variance with the facts. We believe that the type of misconception that such advertising as this can engender in the minds of

couples seeking to provide financially for the birth of children is especially vicious. There can be no question that it is a patent deception to describe as "additional" a benefit which excludes participation in other benefits, directly following a broad representation that hospital and surgical expenses are covered.

In view of the foregoing, the initial decision is vacated and set aside, and our findings as to the facts, made on consideration of the whole record including the initial decision, and conclusions and order to cease and desist will be issued in lieu thereof.

Commissioners GWYNNE and MASON dissent.

APRIL 24, 1956.

United States of America

Before Federal Trade Commission

Docket No. 6237

In the Matter of

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, A CORPORATION

JOINT DISSENTING OPINION OF CHAIRMAN GWYNNE AND COMMISSIONER MASON

We are unable to agree with the views expressed in the majority opinion. The reasons for our dissent are: first, the opinion completely ignores the intent of Congress in adopting Public Law 15 (McCarran Act); second, it would return the insurance business to the uncertainty and confusion which followed the decision in *U. S.* v. *South-Eastern Underwriters Association*

(1944), 322 U. S. 533. It was to remove this uncertainty and confusion that the McCarran Act was adopted.

Prior to the decision in the *South-Eastern Underwriters* case, regulation of insurance was recognized as a problem for the respective states. This was partly because the Supreme Court of the United States in a long line of decisions from *Paul* v. *Virginia*, 8 Wall. 168, *to New York Life Insurance Company* v. *Deerlodge County*, 231 U S. 495, had held that the business of insurance was not commerce.

Although the business of insurance was not subject to regulation under the commerce clause, it was universally recognized as a business affected with a public interest. Consequently, the states found few obstacles to regulating it to the fullest extent and in the manner the respective legislatures thought to be for the public good in their particular states. These laws took the form of determining who should engage in the insurance business within the state boundaries, the terms under which the business might be conducted, regulation as to rates to be charged (even to the extent of fixing them, or permitting representatives of insurance companies to do so under state supervision). The right of the states to levy tax and license fees, even discriminating against foreign insurance corporations, was also recognized. See 44 C. J. S., p. 518; *LaTourette* v. *McMaster, Insurance Commissioner*, 244 U. S. 465.

Had these regulations been directed at the usual industry engaging in interstate commerce, many would have run counter to paramount Federal authority. For example, the many discriminatory taxing programs were not in accord with decisions of the Su-

preme Court relating to interstate commerce generally. Certain state rate regulations were contrary to the philosophy of Federal antitrust laws. No conflict arose, however, because it had been settled that the business of insurance was not interstate commerce.

This does not mean that the insurance business and the states in regulating it were free from all Federal constitutional and statutory provisions. They were, of course, subject to such constitutional restraints as the due process clause, the exclusive right of Congress to establish post offices and post roads [*U. S.* v. *Sylvanus* (1951), 192 F. 2(d) 96] and many others. In fact they were, and still are, subject to all restraints properly imposed by paramount power, except as that power elects to exempt them.

In regulating insurance, states act under that great reservoir of power known as the police power. There are, of course, jurisdictional limitations on the exercise of that power. It may be directed only at activities within the state. It has never been claimed that the states may operate directly in that phase of regulation known as the flow of commerce. Nor by no stretch of the imagination can it be said that the McCarran Act intended to give any such power.

In 1944, in the *South-Eastern Underwriters* case, the court reversed its holdings of 75 years standing and concluded that the business of insurance was interstate commerce. It was also specifically held that it was subject to the Sherman Act.

The immediate effect of this decision was to bring the business of insurance and the laws of the various states regulating it under the paramount power of the Federal antitrust laws. Because of the inconsistency previously referred to, this created considerable un-

certainty and confusion in the insurance field, of which Congress took immediate cognizance.

Confronted with this emergency, Congress had several alternatives:

(1) It might take no action and allow the antitrust statutes to be superimposed on the existing state systems of regulation and taxation. This would create great confusion as to the legal boundaries between Federal and state control, which confusion could only be lessened, bit by bit, as courts made decisions on specific problems.

(2) It might write a comprehensive law for Federal regulation of insurance—a law which would provide new methods for many matters theretofore handled by the states, and which might make such changes in the application of existing antitrust laws to the peculiar business of insurance as experience had indicated might be necessary.

(3) It might recognize and continue existing or future state regulation by removing the obstacles to that regulation which had been called into being by the decision that the business of insurance was interstate commerce.

Congress chose the latter course and expressed its choice by the adoption of the McCarran Act. The general purpose of this legislation was to meet the problems created by the *South-Eastern Underwriters* case. The plan for meeting this problem is clearly expressed in the law. It may be reduced to a simple statement as follows: The Congress declares that the continued regulation and taxation by the states of the business of insurance is in the public interest and shall remain, with two exceptions, namely, (1) this

Act shall not render the Sherman Act inapplicable to agreements to or acts of boycott, coercion or intimidation, and (2) that after June 30, 1948 (but not before), the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance, but only to the extent that such business is not regulated by state law. Thus, in any case, the jurisdictional question may be quickly and certainly resolved by finding the answer to a simple question, namely, is there state regulation to meet the particular problem presented by the facts.

That this is the proper interpretation of the law is indicated by the following: (1) the wording of the statute itself, (2) the legislative history, (3) events which transpired immediately following passage of the law, (4) decisions of the courts interpreting the McCarran Act.

It is, of course, well settled that the power of Congress under the commerce clause is broad and is also paramount. It includes the right to regulate, or even prohibit, the flow of things across state lines, the right to regulate the instrumentalities by which commerce is carried on, and also the right to regulate activities, wholly within the state, which affect interstate commerce. The power to regulate the so-called flow of commerce covers every species of movement of persons and things, whether for profit or not; every species of communication; every species of transmission of intelligence, whether for commercial purposes or otherwise; every species of commercial negotiations, which, as shown by the established course of business, will involve sooner or later an act of transportation of persons or things, or the flow of services or power across state lines. (See the *Analysis of the United*

States Constitution as prepared by the Legislative Reference Service, Library of Congress, and cases cited.)

The great power of Congress to regulate matters wholly within the state but affecting interstate commerce is well settled in *U. S.* v. *Darby* (1944), 312 U. S. 100, in which the court held that the payment of substandard wages wholly within a state affected commerce and could be prohibited.

Going with these great powers, and a necessary corollary to them, is the right of Congress to determine where and when these powers are to be used. Thus, it may decline to exercise certain powers; and it may condition its refusal to exercise them on the fact of regulation by the states.

This is exactly what Congress was seeking to do in the McCarran Act. Much of the fallacy of the reasoning in the majority opinion springs from a refusal to recognize this obvious fact. The majority would decide the issues in this case by applying principles which admittedly were applicable following the decision in the *South-Eastern Underwriters* case. They conveniently ignore the fact that the purpose of the McCarran Act was to prevent the application of these principles.

For convenience, and before discussing the law in detail, the McCarran Act is set out here in full text.

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regula-

tion or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of

June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person, or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected.

While the title to a statute is not, strictly speaking, a part of the law, nevertheless, it is interesting to note that the title is "To express the intent of the Congress with reference to the regulation of the business of insurance."

Immediately after the enacting clause, occurs the following:

> That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, * * *.

This is a clear and positive declaration of Congressional policy, which cannot be read out of the law. It expressly points out the character of state regulation and taxation which is in the public interest. It is the "continued regulation". In the past, the states have done all the regulating so far as the commerce clause was concerned. That was to carry on, with the exceptions expressly provided for, and which will be discussed hereafter. There is nothing in this statement or in the entire Act which justifies the interpretation

that the regulation contemplated was to continue only by the grace of the Federal Trade Commission.

Speaking on this subject in *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, the Supreme Court of the United States had this to say:

> Obviously Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several States in these respects.
>
> Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.
>
> * * * * *
>
> * * * it clearly put the full weight of its power behind existing and future State legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, sub-

ject only to the exceptions expressly provided for.

That a declaration of policy by Congress will be given weight by the courts is well settled. See *U. S.* v. *Darby*, 312 U. S. 100.

Continuing, the statute further provides:

> * * * and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Some of the powers granted to Congress by the Constitution are either expressly, or by necessary implication, exclusive and cannot be exercised by the states, even though Congress has taken no action thereon and has remained silent on the subject. The power to declare war is an example. Under the commerce clause, the line between Federal and state authority cannot be so precisely drawn. This is particularly true in the field of state activities which may or may not have a prohibited effect on interstate commerce. The supremacy of the Congress, when properly exercised in this field, is clearly recognized. A difficult problem arises where the powers of Congress are allowed to lie dormant, that is, when Congress is silent on a given subject. Should its silence be construed as a reservation of its power, which will bar any state regulation; or will it be considered as consent to state action until Congress has spoken? This question has arisen many times and has received a variety of answers, depending upon the circumstances of the particular case.

The question of silence of Congress is not involved in this case. The Congress evidently thought it might be raised, and intended to make its position clear. The inclusion of the above quoted clause indicates how

thoroughly Congress has considered this matter and how determined it was to remove all possible barriers to its declared policy of state regulation.

Section 2 (a) provides:

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

When used in this connection, "subject to" means "subordinate to", "obedient to". *Shay* v. *Roth*, Calif. (1923), 221 P. 967; *Davies* v. *City of Los Angeles* (1890), 24 P. 771.

In a long line of cases from *Paul* v. *Virginia* to *New York Life Insurance Co.* v. *Deerlodge County*, insurance companies have challenged their subjection to state regulatory or taxing laws. The Supreme Court, however, consistently rejected this defense on the theory that the business of insurance was not interstate commerce.

When the Supreme Court in *South-Eastern Underwriters* reversed its decision, this defense became good, and the business of insurance was subject to state laws, only to the extent that such laws did not interfere with paramount Federal power under the commerce clause. In Section 2 (a) Congress clearly showed its intention to remove the barrier of its own paramount power and thus make the business of insurance subject to state laws, notwithstanding the decision in *South-Eastern Underwriters*.

Section 2 (b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon insurance: *Provided*, That after

> January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Stronger language to give state laws "top billing" could hardly be imagined. The clause beginning with "unless" is particularly significant. While Congress had not legislated directly concerning the insurance business, it had done so with reference generally to interstate commerce and with reference to persons and corporations engaged therein. The antitrust laws are examples. Congress in Section 2 (b) said none of these laws (except as indicated in the proviso) shall apply to the business of insurance, unless such law specifically relates to insurance. It recognized: first, that insurance has some problems peculiar to that industry; second, that many states had adopted regulatory systems tailored to the insurance business in their boundaries; and, third, that any attempt to superimpose the general laws regulating commerce on these systems would create great confusion.

The proviso applies only to the provision immediately preceding it. *Dahlberg* v. *Young* (1950), Minnesota 42 N. W. 2nd 570. It provides an exception to the general statement preceding it, which exception is that the three Acts named therein shall, after January 1, 1948, apply to the business of insurance—but only to the extent that such business is not regulated by state law. This proviso was adopted to answer criticism of the original House bills, which provided simply that certain laws shall not apply to the

business of insurance or to acts in the conduct of that business. In other words, in the original bills, the House proposed to wash its hands of the whole matter, regardless of whether any particular state had provided regulation. The final version, which was accepted by the House without objection, simply conditioned Federal withdrawal from the field on the fact that the particular state had provided regulatory laws. In view of the strong stand taken by the House in favor of continued state regulation, it does not seem reasonable that it would have accepted, without question, this final version, if (as claimed by the majority) such versions set up concurrent jurisdiction, with the Federal power paramount to the state power.

What Congress had in mind is further illustrated by Section 3 (a) which provides that until January 1, 1948, the antitrust laws should in no event apply to the business of insurance. The majority claim that the purpose of this moratorium was to give the states time "in which to design a reasonable area of state police power. Beyond that reasonable area, states could not go."

That view is based on a misconception of the state police power. That power was reserved to the states by the Constitution. It is not up to the Congress to determine whether it is exercised reasonably. Whether exercised reasonably or not, this power is subject, at all times, to the paramount power of the Federal government under the commerce clause and other constitutional provisions not involved here; and in case of conflict, the question is resolved by the Federal government and not by the states. The whole purpose of the McCarran Act was to express the Congressional intent that the barrier of paramount power

under the commerce clause was to be removed in the event that the states did adopt regulatory laws. The purpose of the moratorium was to give the states time to adopt such laws. Failing to do so in any particular area, the Federal power would still remain.

Section 3 (b) provides:

> Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

The *South-Eastern Underwriters* case involved a boycott by a number of insurance companies operating in several states. The Congress concluded that the paramount power of the Federal government in such cases should remain.

The fact that Section 3 (b) is in the law is a strong argument against the interpretation urged by the majority. If the McCarran Act left the Federal government and the states with concurrent powers (in which the Federal power would necessarily be paramount), why was it necessary to include Section 3 (b)?

The legislative history of the McCarran Act strongly supports our interpretation of the jurisdictional feature.

While the *South-Eastern Underwriters* case was pending in the Supreme Court, bills were introduced in the House, providing for the unqualified exemption of insurance from the Sherman and Clayton Acts. Thereafter, and after considering suggestions by representatives of the National Association of State Insurance Commissioners, and also by representatives of the insurance industry, bills were introduced both in the House and Senate, which bills, with some minor

modification, eventually became the McCarran Act. In some respects, these bills further limited the control of Congress, as, for example, in the inclusion of the Federal Trade Commission Act. In other respects, the Federal authority was broadened to retain control, in all cases where state regulation did not exist. The law, as finally passed, is clear on this point; regulation shall remain in the states with the exception of the boycott situation, and with the exception of those situations where a state either did not or could not adopt the necessary regulations.

There is literally no evidence to the contrary. Note the following excerpts from the Senate debate.

> Senator MURDOCK. And it is intended that on the expiration of the moratorium, the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective, except——.
>
> Senator MCCARRAN. Except as the states themselves have provided regulation.
>
> * * * * *
>
> Senator PEPPER. States may determine whether or not the Sherman and other acts become applicable to the business of insurance?
>
> Senator MCCARRAN. Yes.

What was done after the adoption of the McCarran Act indicates that the persons concerned had no doubt about the meaning of the Act. The National Association of State Insurance Commissioners prepared a model code for the regulation of the insurance business in accordance with the directions of Congress. This code has been adopted by a majority of the state legislatures. Other states have adopted laws which in effect are equivalent

It is difficult to understand why these actions should have been taken if the parties thereto thought that the net result would leave the law as it was just prior to the McCarran Act, which is the contention of the majority in this case.

The McCarran Act has been considered in four Federal court cases. In none of them, did the court experience any difficulty in determining what the McCarran Act meant. In the Sylvanus case, the court said:

> It is clear, we think, that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several States.

In *Maryland Casualty Company* v. *Cushing* (1953), 347 U. S. 409, the Supreme Court said:

> Even the most cursory reading of the legislative history of this enactment (McCarran Act) makes it clear that its exclusive purpose was to counteract any adverse effect that the court decision in the South-Eastern Underwriters case might be found to leave on state regulation of insurance.

The Court then quotes from House Report No. 143, 79th Congress, 1st Session, as follows:

> It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision in the South-Eastern Underwriters case.

A clearer and more concise statement of the extent of the McCarran Act, and also its limitations, could harly be found.

In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange* (1950), 181 F. 2d, 174, the Court said:

> The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by Federal legislation relating to interstate commerce. See *Prudential Insurance Co. v. Benjamin,* supra, p. 429 of 328 U. S.
>
> In view of what was said by the Supreme Court about the effect of the McCarran Act in the *Prudential Insurance Co.* case and the case of *Robertson v. People of State of Calif.*, 328 U. S. 440, 449, 461, there is no need for discussing the validity or effectiveness of the McCarran Act. A ruling that it is invalid or ineffectual, we think, would be absurd.

The *Prudential Insurance Company* case is directly in point. There, the Prudential company challenged a statute of South Carolina which imposed on foreign insurance companies as a condition of doing business within the state, an annual tax of 3% of premiums on business done in the state without reference to transactions, whether interstate or local. It should be noted that the case did not involve purely intrastate matters, which the majority claim is the limit of the McCarran Act's effectiveness. This state tax was clearly discriminatory, affected interstate commerce, and would ordinarily have been stricken down. However, it was not, and the reason given was that a state tax or regulation discriminating against in-

terstate commerce which would be invalid under the commerce clause, in the absence of action by Congress, may be validated by the affirmative action of Congress consenting thereto. The only difference between the Prudential case and the one at bar is that the former deals with state taxation and the latter with state regulation. The McCarran Act covers both.

The majority view of jurisdiction under the McCarran Act is entirely different. They say the McCarran Act "was designed to permit the states to regulate, *in the traditional manner,* the business of insurance." They obviously do not mean they are permitted to regulate it as they did prior to the *South-Eastern Underwriters* Case, because their decision in this case asserts the paramount power of Federal laws over those of the states.

Now law of Congress was necessary to give the states a right to carry on activities within their own borders, designed to regulate insurance. That is covered under the police power, guaranteed to the states by the Constitution. Just as Congress with reference to powers under the commerce clause, state legislatures may exercise these powers or not as they choose, subject only to their own and the Federal Constitution. The real problems arise when the exercise of these powers come in conflict with the commerce clause. There, the Federal power is paramount. *Parker* v. *Brown,* 317 U. S. 34. *Southern Railway Company* v. *Railroad Comm. of Indiana,* 236 U. S. 439. But, as was pointed out in the latter case, Congress could have circumscribed its regulation so as to occupy a limited field." This intention to occupy a limited field is the very essence of the McCarran Act.

Just how far the majority would go in disregarding this intention is well illustrated in the case at bar. For example, suppose a state having the model code should decide that certain advertising disseminated therein did not violate the law. Nevertheless, the Federal Trade Commission asserting its paramount power to regulate the flow of commerce into the state comes to an opposite conclusion. Or suppose the state officials held the advertising was illegal, while the Federal Trade Commission held to the contrary. The majority decision does not recognize state regulation; it destroys it.

The cases cited do not support the majority position. Of course, the Federal government, under the commerce clause, may regulate the flow of lottery devices into a state, regardless of state laws on the subject. The reason is that Congress has never enacted in the lottery field an equivalent of the McCarran Act. It requires a violent stretching of the imagination to find any support in the *Sylvanus* decision. There, the defendant was indicted under a statute prohibiting the use of the mails to defraud. The power of Congress in mail fraud matters does not depend on interstate commerce; it is based on the exclusive Constitutional right to control the mails. Prior to the South-Eastern Underwriters case, immediately after and prior to the McCarran Act, and under the McCarran Act, the result would have been the same. As the Court well expressed it, "This indictment does not have to do with the regulation of the insurance business in Illinois. Rather it has to do with the question of whether defendants have used the mails in pursuance of a scheme so to manipulate their authorized regulated business in Illinois as to result in fraudulent deception

of its prospective policy holders. The charge is not that the corporate charter should be ignored or that the administrative officers of Illinois may not perform their statutory duties and supervise and regulate the company's insurance business in Illinois, but goes to the use of the mails over which Congress has by the Constitution paramount power and authority."

The McCarran Act arrests the overriding power of the Federal government under the commerce clause as it affects insurance, where the states have regulatory laws. Nowhere does the Act express any intention of doing the same with the power to regulate the mails, the power to enforce due process, or the many other constitutional powers.

To us, the conclusion is inescapable that under the majority view, the McCarran Act accomplished nothing. Courts will not presume that a statute was meant to have no effect. On the contrary, it will be presumed that the legislative body intended to make some change in existing laws, particularly where the whole history shows they intended to remedy what they thought was an existing evil. This rule is usually applied in situations where the over-all intent is not clearly expressed in clear language.

Here, the majority would reverse these well-known rules of statutory construction in order to prove that Congress accomplished nothing. They, in effect, rewrite portions of the McCarran Act as follows:

> That the Congress hereby declares that paramount regulation and taxation by the Federal Government of the business of insurance, rather that the continued regulation and taxation thereof by the several States, is in the public interest.

SEC. 2. (a) The business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business, only to the extent that such laws do not conflict with the paramount Federal power under the commerce clause.

SEC. 2. (b) Any Act of Congress, whether it specially relate to the business of insurance or not, shall be construed to invalidate, impair or suspend any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, whenever the State law conflicts with such Act of Congress. The Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance regardless of any State regulation on the subject.

II

Our second objection to the majority opinion is that it would return the insurance business to the confusion into which it was plunged by the South-Eastern Underwriters decision. The nature and extent of that confusion was well expressed by the dissenting judges. The late Mr. Chief Justice Stone said:

> "* * * And in view of the broad powers of the federal government to regulate matters which, though not themselves commerce, nevertheless affect interstate commerce, *Wickard* v. *Filburn,* 317 U. S. 111; *Polish Alliance* v. *Labor Board, supra,* there can be no doubt of the power of Congress if it so desires to regulate

many aspects of the insurance business mentioned in this indictment.

But the immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. Congress having taken no action, the present decision substitutes, for the varied and detailed state regulation developed over a period of years, the limited aim and indefinite command of the Sherman Act for the suppression of restraints on completion in the marketing of goods and services in or affecting interstate commerce, to be applied by the courts to the insurance business as best they may.

In the years since this Court's pronouncement that insurance is not commerce came to be regarded as settled constitutional doctrine, vast efforts have gone into the development of schemes of state regulation and into the organization of the insurance business in conformity to such regulatory requirements. Vast amounts of capital have been invested in the business in reliance on the permanence of the existing system of state regulation. How far that system is now supplanted is not, and in the nature of things could not well be, explained in the Court's opinion. The Government admits that statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act, and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act. The extent to which still other state statutes will now be invalidated as in conflict with the commerce clause has not been explored in any detail in

the briefs and argument or in the Court's opinion.

The late Mr. Justice Jackson said:

> The states began nearly a century ago to regulate insurance, and state regulation, while no doubt of uneven quality, today is a successful going concern. Several of the states, where the greatest volume of business is transacted, have rigorous and enlightened legislation, with enforcement and supervision in the hands of experienced and competent officials. Such state departments, through trial and error, have accumulated that body of institutional experience and wisdom so indispensable to good administration. The Court's decision at very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered. What will be irretrievably lost and what may be salvaged no one now can say, and it will take a generation of litigation to determine. Certainly the states lose very important controls and very considerable revenues.
>
> The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. * * *
>
> It is impossible to believe that Congress, if it ever intended to assume responsibility for general regulation of insurance, would have made the antitrust laws the sole manifestation of its purpose. Its only command is to refrain from restraints of trade. Intelligent insurance regulation goes much further. It requires careful supervision to ascertain and protect solvency, regulation which may be inconsistent with unbridled rate competition. It prescribes some provisions of policies of insurance and many other matters beyond the scope of the Sherman Act.

> Also it requires sanctions for obedience far more effective than the $5,000 maximum fine on corporations prescribed by the antitrust laws. Violation of state laws are commonly punishable by cancellation of permission to do business therein—a drastic sanction that really commands respect.

The accident and health insurance industry is a large and important one; yet, it is a small part of the business of insurance. This case, under Section 5 of the Federal Trade Commission Act, involves only a matter of advertising. But Section 5 is a comprehensive section which covers many things, such as combinations and restraints under the Sherman Act and at common law, price fixing, and many other things which the Federal Trade Commission might hold to be unfair methods of competition.

As has been frequently said, insurance is a business effected with a public interest. Many years of regulation in 48 states have developed the fact that insurance has some problems peculiar to the business. One is the necessity of maintaining an industry whose financial ability to meet obligations accruing many years in the future will not be undermined by short term considerations. Consequently, the states have asserted their right to regulate the financial policies of the companies licensed to do business in their states, to demand the deposit of certain reserves, to regulate and even limit competition, to fix rates, etc. Some of the regulations permit, or even require, cooperative action among insurance companies which could easily be contrary to the philosophy of the Federal antitrust laws.

In this connection, the majority opinion says:

> However, as we have already said, our proceeding to abate deceptive practices by such companies does not impinge on those state functions, and we do not believe that the Federal Trade Commission Act can be properly interpreted to interfere with the taxing or rate-fixing powers.

We have already called attention to the breadth and extent of the Federal power to regulate the flow of commerce and also to the extensive power under the "affecting interstate commerce" theory to regulate matters entirely within the state which were once thought to be far removed from Federal authority. In South-Eastern Underwriters, the Supreme Court called attention to the many activities of a modern insurance company which involved or affected interstate commerce as we now know it. Such activities are necessarily centered in a home office. From there and to there, flows a constant stream of advertising brochures, policies, applications, statements, rate schedules, directions, etc. These have to do with all the activities of the insurance business and are not restricted to advertising.

In this case, jurisdiction is based on the admitted fact that the respondent sent bundles of advertising matter into states where it was licensed to do business. Actual dissemination of the advertising occurred entirely within the state. Except for the McCarran Act, it is clear this limited proof would sustain paramount Federal jurisdiction. Just how the majority arrive at the conclusion that similar proof would not sustain Federal jurisdiction in taxing and rate-making matters is not clear.

In fact, the decision in *North Little Rock Transportation Co.* v. *Casualty Reciprocal Exchange, supra,* is to the contrary. That case involved an appeal from a summary judgment of dismissal of a treble damage suit. The dismissal was based upon a determination that the fixing of rates by the National Bureau of Casualty Underwriters for casualty insurance written in the State of Arkansas by the members and subscribers of the Bureau is not violative of the Sherman Act, as amended. The Court adopted the findings of the District Court, one of which was:

> 3. In the absence of public regulation or Congressional exemption, the price fixing activities of the Bureau involved in this case would constitute a violation of the Sherman Act. [85 F. Supp. 961, at p. 964.]

The Circuit Court of Appeals affirmed the holding of the District Court that the McCarran Act permitted the State of Arkansas to continue the regulation of insurance in the matter of rate fixing, which regulation, without the McCarran Act, would have violated the Sherman Act.

It is our conclusion that the majority opinion would bring tremendous confusion in the insurance industry and would open the door wide to complete Federal control. We are not discussing the relative merits of Federal versus state control. All we say is that the decision belongs to Congress and not to a Federal bureau.

The hearing examiner, after applying the jurisdictional tests to which we subscribe, concluded that in all states in which respondent was licensed to do business, except Mississippi, state regulation did exist. The hearing examiner then considered the alleged

illegal advertising in Mississippi and concluded that it did not violate the Federal Trade Commission Act.

We have repeatedly pointed out that, under the McCarran Act, the Federal Trade Commission has some jurisdiction in the business of insurance. Within that jurisdiction, and in performance of duties imposed by Congress, 41 complaints have been issued. Where the Commission has jurisdiction, we would hold insurance companies to a high degree of responsibility in their dealings with the public. Consequently, we do not approve of some of the statements made by the hearing examiner in his consideration of the advertising in question.

However, that matter is not now before us. Since the filing of the initial decision, Mississippi has adopted the model code, effective as of February 29, 1956.

The law governing such a situation is clearly expressed in *United Corporation, et al.* v. *Federal Trade Commission* (1940), 110 F. 2d 473, as follows:

> And since the power of the Federal Trade Commission is purely regulatory and not punitive, it is clear that jurisdiction must exist at the time of the entry of its order. Jurisdiction at the time of the commission of acts objected to as unfair trade practices or at the time of the filing of the complaint with regard thereto is not sufficient; for the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future.

In *Chamber of Commerce of Minneapolis, et al.* v. *Federal Trade Commission* (1926), 13 F. 2d 673, the Court said:

> As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the Jurisdiction of the Commission should, in this respect, be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon.

It thus appears that in every state involved in this case, state regulation now prevents further action by the Commission.

In accordance with the views expressed in this dissent, we would deny the appeal and dismiss the complaint.

APRIL 24, 1956.

United States of America

Before Federal Trade Commission

Docket No. 6237

In the Matter of

THE AMERICAN HOSPITAL AND LIFE INSURANCE COMPANY, A CORPORATION

ADDITIONAL VIEWS OF COMMISSIONER MASON

The issue here resolves itself basically into that ever fundamental question—states' rights versus centralized government.

Our problem is not the determination of which philosophy is right—that is a legislative function. Our sole duty is to determine which road Congress has directed us to follow in the instant matter.

In my opinion, if the rationale on which the majority bases its decision in this case stands, it must of necessity follow that the Federal Government has

almost unlimited control over the management of the insurance business.

This would apply not only to false advertising of health and accident policies, the present center of our attention in 41 cases, but would include all other aspects of the business of insurance, such as the approval of policy forms, the establishment of rates, the maintenance of reserves, the regulation of agency commissions, and the countless other components of the internal management of any single company or companies.

To transfer in one fell swoop the control of every phase of the business of insurance, whether regulated or not by state law, to the Federal Government when crossing state lines is to flout the expressed intent of Congress.

APRIL 24, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1957